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November 30, 1995

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW - Room 222
Washington, DC 20554

Re: Reply Comments of A&E Television Networks
IB Docket No. 95-168
PP Docket No. 93-253

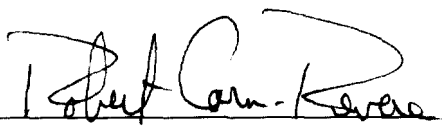
Dear Mr. Caton:

Enclosed are an original and nine copies of the Reply Comments of A&E Television Networks, which are being filed in connection with the above-referenced proceeding.

If there are any questions regarding this matter, please communicate with the undersigned counsel.

Respectfully submitted,

HOGAN & HARTSON L.L.P.

By: 
Robert Corn-Revere

Attorneys for A&E Television
Networks

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Revision of Rules and Policies for the)	IB Docket No. 95-168
Direct Broadcast Satellite Service)	PP Docket No. 93-253
)	
Notice of Proposed Rulemaking)	

To: The Commission

REPLY COMMENTS OF A&E TELEVISION NETWORKS

A&E Television Networks ("A&E"), by its attorneys, respectfully submits these Reply Comments in the above-captioned proceeding in order to respond to proposals made in the initial round of comments that would unnecessarily restrict the actions of programmers with no cable or DBS affiliations.

A&E is a video programmer that is neither owned nor controlled by any cable operator or DBS operator. It offers both A&E Network and The History Channel. A&E Network features critically-acclaimed original entertainment programming, including the series BIOGRAPHY®, mysteries, dramatic programs and specials. Over 80 percent of A&E Network's prime time schedule consists of original productions. The high-quality, original programming offered on this network has earned A&E Network more CableAce Awards than any other basic cable network. The History Channel, which was launched on January 1, 1995, offers similar high-quality programming featuring historical documentaries, movies

and miniseries placed in historical perspective. These channels are currently carried by DirecTV, Inc. ("DirecTV") and Primestar Partners, L.P. (which currently carries only A&E Network). A&E hopes to expand its relationships with DBS operators as the industry grows. 1/

The comments of EchoStar Satellite Corporation and Directsat Corporation ("EchoStar/Directsat") and of DirecTV include proposals which would unreasonably and unnecessarily restrict unaffiliated programmers such as A&E in their efforts to establish mutually-beneficial relationships with DBS operators. Specifically, EchoStar/Directsat have urged the Commission to extend the anti-discrimination prohibitions of its program access rules, 47 C.F.R. §§ 76.1002-76.1003, to unaffiliated programmers. 2/ DirecTV has proposed prohibiting unaffiliated (and vertically-integrated) programmers from entering exclusive programming contracts with cable-affiliated DBS providers. 3/ The proposal of EchoStar/Directsat is well beyond the scope of the Commission's inquiry. Moreover, both of these proposals are unnecessary and in direct conflict with congressional intent. Thus, they should be firmly rejected.

In the Notice of Proposed Rulemaking ("NPRM") issued in this proceeding, the Commission requests comments on whether to impose any service

1/ EchoStar Satellite Corporation and Alphastar are currently finalizing agreements for carriage of both A&E Network and The History Channel. This demonstrates that EchoStar/Directsat's proposal is unnecessary.

2/ Joint Comments of EchoStar/Directsat at 48-51.

3/ Comments of DirecTV at 20.

requirements on cable-affiliated DBS licensees. 4/ Yet, EchoStar/Direcstsat have responded to this question on rules for cable-affiliated DBS licensees with a broad and unrelated proposal to extend the discrimination provisions of the program access rule to unaffiliated programmers. This broad proposal is outside the scope of this proceeding. It would be improper to adopt such a proposal at this point because the parties most affected by it did not have adequate notice that such a rule was under consideration.

In any event, the proposals of EchoStar/Direcstsat and DirecTV are unnecessary. EchoStar/Direcstsat and DirecTV have failed to provide any evidence of discrimination by unaffiliated programmers against unaffiliated DBS operators in general or with respect to exclusive programming arrangements.

EchoStar/Direcstsat merely theorize, without citing a single example, that the program access rules “leave cable operators free . . . to compel [unaffiliated] programmers to discriminate against DBS providers,” and “potentially” enable cable operators to channel programming into unaffiliated programmers then enter exclusive arrangements with the programmer. 5/ Citing an academic theorist who provides no actual examples, DirecTV claims that cable companies may use their market power to force unaffiliated programmers to provide exclusive DBS rights. 6/ This is nothing more than conjecture.

4/ NPRM at ¶ 57-60.

5/ Joint Comments of EchoStar/Direcstsat at 49.

6/ Comments of DirecTV at 20.

Practical experience contradicts the speculations of EchoStar/Direcstar and DirecTV. For example, A&E has no incentive to discriminate against unaffiliated DBS operators, nor has it been coerced by a cable operator to discriminate against DBS operators. To the contrary, A&E has strong incentives to maximize its relationships in the DBS industry, especially given the expected market for DBS and the proposed limitations on cable operator participation in DBS. For that reason, A&E's policy is not to enter exclusive contracts. Nevertheless, A&E would like to retain its flexibility in entering contractual arrangements, and Congress has "recognized that exclusive programming contracts and cost-justified differences in prices can enhance competition among MVPDs and sought to ensure that such pro-competitive programming arrangements were not unduly circumscribed." 7/ Thus, the Commission has even refused to establish a *per se* prohibition on an exclusive arrangement between a DBS operator and vertically-integrated programmers. 8/

The proposals of EchoStar/Direcstar and DirecTV to restrict unaffiliated programmers also violate congressional intent. In adopting the Cable Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), 9/ Congress was concerned with the conduct of vertically-integrated programmers, not *all*

7/ NPRM at ¶ 59.

8/ See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Memorandum Opinion and Order on Reconsideration of the First Report and Order*, 10 FCC Rcd. 3105 (1994).


9/ Pub. L. No. 102-385, 106 Stat. 1460 (1992).

programmers. It found that regulations were necessary only where “cable operators have the incentive and ability to favor their affiliated programmers” or “[v]ertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies.” 10/ Congress did not intend to restrict unaffiliated programmers as well, simply because cable operators *might* attempt to exert influence over them.

Unaffiliated programmers should not be denied contractual flexibility by the imposition of unnecessary restrictions that conflict with congressional intent. Therefore, A&E respectfully urges the Commission to reject the proposals to apply any portion of the program access rules to unaffiliated programmers.

Respectfully submitted,

A&E TELEVISION NETWORKS

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November 30, 1995

10/ 1992 Cable Act § 2(a)(5), Pub. L. No. 102-385, 106 Stat. at 1460-1461.